No. 11524

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN S. BLEKER, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable William Denman, Chief Judge, and the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Petitioner, the appellant, John S. Bleker, Jr., respectfully urges this Honorable Court to grant him a rehearing upon the judgment on appeal filed May 26, 1949.

I.

Preliminary Statement.

The appellant Bleker was acquitted of three of the four counts on which he was jointly indicted with two of his subordinates in the Marine Corps Post Exchange at Camp Pendleton. One of his co-defendants, Gleason, pleaded guilty to two counts and the other, Robinson, was found guilty on three.

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By this petition for rehearing Major Bleker is still trying to extricate himself from the original position in which he was placed by the joint indictment. His acquittal on the conspiracy count has indeed been an empty victory up to date.

The appellant Bleker remains the forgotten man of this case. The trial transcript, the appeal briefs, even the opinion of this Court all reflect the principal concern of the jury and Court with the misdeeds of Robinson and Gleason.

Thus, although he was acquitted of it, the smearing effects of the original conspiracy charge have continued to pervade the case against Major Bleker. The salient facts that point to his own innocence are still obscured although this Court did say in its opinion (p. 5):

> "The direct evidence was considerably less against Bleker than Robinson."

In considering how much *"less"* that evidence was it should be recalled that Major Bleker did not receive one penny from the illegal activities of his subordinates. Furthermore, he repeatedly warned them against "kickbacks" and dishonest conduct of any kind. [This was the testimony of the Government's own witness, Tr. 728, 894.] He misled no one, defrauded no one. Rather, Major Bleker was the one defrauded—defrauded by a misplaced faith in his subordinates—his old comrades in arms.

Before the badge of guilt is to be forever substituted by this Court for the honors earned by appellant Bleker in

nearly seven years of service which saw his promotion from private to major, he simply asks in this petition that the record be re-read with a single question in the mind of the Court. Would the jury's verdict be the same if he were tried alone for the single substantive offense of which he now stands convicted?

Appellant Bleker submits that to this question, a negative answer is inescapable—that he certainly would be acquitted by a jury confronted with the sole task of determining the culpability of what he, Bleker, did or did not do.

The record demonstrates that Major Bleker could not have been rescued from his present plight no matter how carefully his counsel might have phrased his motions or how carefully the Court might have limited the legal effect of the damaging testimony.

The deadly work was done when he was charged and tried for conspiring with Robinson and Gleason. That work can only be undone by giving Major Bleker a new, separate trial.

Then, and only then, can his case be tried, free from the pervasive stench of the hotel room intrigues and black market furtiveness of the others, from whom he has now been cleared of criminal association. The favorable outcome of that kind of a trial for Major Bleker is hardly even in doubt. It is that chance which he asks this Court to give him by granting a rehearing and reversing the judgment.

II.

The Opinion of This Court Is Confined to the Naked Question of the Admissibility of Evidence and Has Not Considered Its Harmful Effect in the Context of a Disproved Conspiracy.

This Court stated at page 5 that:

> "An analysis of the entire record establishes that all the evidence admitted against him (Bleker) was either unquestionably admissible or at least admissible within the discretion of the trial court in connection with Count 1—the conspiracy count."

Appellant submits that mere admissibility is not enough in the case of a disproved conspiracy, particularly in the light of *Krulewitch v. U. S.,* 93 L. Ed. Adv. Ops. 623, decided after this matter was submitted on oral argument.

This was the case in which Mr. Justice Jackson said at page 627:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or *in addition thereto,* suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." (Emphasis supplied.)

The fact that evidence might have been technically admissible against appellant Bleker on the conspiracy count does not mean that an injustice to him could not result. As was said in the *Krulewitch* case at page 631:

> "It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Truly, this has been a matter in which it was difficult for appellant Bleker to make his case stand upon its own merits. In such a case "admissibility" alone cannot be the yardstick to determine whether justice was administered.

Appellant submits that the true yardstick is the "prejudicial effect" of evidence that ultimately turns out to be irrelevant. If it is prejudicial to the point where the jury cannot reasonably be expected to erase its effect from their minds, then justice calls out for the granting of a new trial.

III.

This Court Was Not Justified in Holding That Appellant Bleker Waived His Objections by Silence and, in Any Case, the Prejudicial Effect Could Not Have Been Removed.

Appellee government conceded that appellant Bleker moved to strike *all* of the testimony covered by Specifications of Error 5 to 11, inclusive, and 13. (Rep. Br. 96.)

Nevertheless this Court, at page 6 of its opinion, has described appellant Bleker's position as that of one "who was silent when he should have spoken." But it is apparent that the fault of appellant Bleker, if any, was not that he did not speak but that he spoke too much—or at least too broadly—in framing his objection. Surely the greater includes the lesser.

But even if the appellant Bleker had couched his objection in precisely correct terms and the Court below had heeded the objection there is little likelihood that the prejudicial effect of the testimony would have been overcome.

Here again the *Krulewitch* case should be cited, at page 631:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a *hodge podge of acts and statements by others* which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy

itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. *The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction.* See *Skidmore v. Baltimore & Ohio R. Co.,* 167 F. 2d 54." (Emphasis supplied.)

Conclusion.

Rule 25 of this Court requires a certificate of counsel that a petition for rehearing is well-founded. In this case, counsel not only makes such representation but makes the additional statement that a new trial in this case for appellant Bleker would definitely result in restoring him to a position of unstained honor in the country which he served so long and well.

Respectfully submitted,

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Certificate of Counsel.

The undersigned is one of counsel for the appellant Bleker and one who has prepared the within petition for rehearing. In my judgment this petition is well founded. Furthermore, it is not interposed for delay.

ROBERT W. KENNY.